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served, go further than is required for our purpose; for, as in both cases the notice to the assured of the limited powers of the agent, whilst adequate, was less direct than in the present, so in both the notice to the principal of the second insurance, although insufficient, was more positive. The authorities

upon the general principles of agency here relied upon, are familiar, and are well digested in most of the text books on that subject. Vide Story on Agency § 135 et seq.; Note to *Batty v. Carswell* and *Peck v. Harriott*, 1 Am. Leading Cases, 535.

W. W. WILTBANK.

Supreme Court of Illinois.

HENRY W. CANDEE ET AL. v. JOHN DEERE ET AL.

A trade-mark is not different in principle from the marks or brands owners of live-stock, which run at large, put upon them. The object is the same, and that is, to distinguish the property bearing it from that of another.

A proprietor can have but one trade-mark, and it must be in some manner attached to the article manufactured.

It must have a practical existence, not resting in the mind of the owner, but stamped or impressed or attached in some way to the article itself.

It is the actual use of the trade-mark affixed to the merchandise of the manufacturer, and this alone, which can impart to it the elements of property.

The mere declaration of a person, however long, and however extensively published, that he claims property in a word as his trade-mark, cannot even tend to make it his property.

The law is well settled, that a circular, price-list, or advertisement, no matter how frequently repeated, cannot constitute a trade-mark.

When words have acquired a generic meaning, one manufacturer has the same right to use them that another manufacturer has.

There can be no property in letters and numbers, or a combination of letters and numbers, where they are used to denote the various sizes and qualities and patterns of the article manufactured.

Monopolies are odious, and a manufacturer cannot acquire property in the *name* of a *town* so as to prevent another manufacturer from doing the same business in the same town and from advertising the fact, so as to let the world know it.

APPEAL from Rock Island Circuit Court.

John Deere and Robert N. Tate commenced to make ploughs in Moline, Illinois, in 1847. In 1852, Deere and Tate dissolved, and John Deere carried on the business at the old stand, and marked the ploughs made by him "*John Deere, Moline, Ills.*" Ploughs continued to be so marked by the appellees, or some one of them, ever since. In 1856, John Deere commenced to use letters and numbers combined, to denote the size, shape, and quality of the ploughs made by him. Ploughs made by him are called at Moline "Deere's Ploughs;" elsewhere they are called

"Moline Ploughs." John Deere advertised his ploughs as "John Deere's Ploughs," "John Deere's Celebrated Centre-Draft Ploughs," and as "Moline Ploughs."

Moline is a manufacturing town, and all articles made there are called after the name of the town, as Moline tubs, Moline buckets, Moline paper, Moline ploughs. In 1867, the appellants, Candee, Swan & Co., commenced to make ploughs in Moline. They branded the ploughs made by them with the words, "*Candee, Swan & Co.*," in a circular form, on the side of the beam, and the words, "*Moline, Ills.*," in a straight line underneath.

The appellees brand the ploughs made by them with the words "*John Deere*" in a circular line, and the words "*Moline, Ills.*" in a straight line underneath.

Both parties brand their ploughs with the letters and numbers, "A No. 1," "AX No. 1," "No. 1," "No. 3," and "B No. 1," to denote the size, shape, and quality of their ploughs, and both advertise them as Moline ploughs, and the public call the ploughs made by both firms *Moline ploughs*.

The appellees, Deere & Co., claimed the letters and numbers "A No. 1," "AX No. 1," "No. 1," "No. 3," and "B No. 1," the words "Moline, Ills.," and the words "Moline Ploughs," as their trade-mark, and filed this bill for an injunction and an account. The court below sustained that claim, and the appellants brought this appeal.

Jas. Grant, C. Whitaker, and Ira C. Wilkinson, for appellants.

Hawley & Pleasants, for appellees.

The opinion of the court was delivered by

BREESE, J.—(After stating the facts).—The testimony shows conclusively that Deere was not the inventor of any part of his plough, and that his great recommendation and praise is, that he had the sagacity to discover to what profitable use the inventions of others could be applied, and, by a well-directed judgment, he has constructed a plough not inferior to any in use in our widespread agricultural community.

But the question arises, Has he secured a trade-mark for his plough, the *appropriating* of which, to his injury, is deemed unlawful? To decide this question, we must first understand what is meant and intended by a "trade-mark," and how it is to be known.

There are but few elementary treatises on this subject. That a trade-mark is a legal possession has been recognised by courts for many years, but its protection by courts of equity is of quite modern origin. A trade-mark is defined in Bouvier's Law Dictionary to be a symbol, emblem, or mark, which a tradesman puts, or wraps, or attaches in some way to the goods he manufactures or has caused to be manufactured. It may be in any form of letters, words, vignettes, or ornamental designs. Upton, in his treatise—and it is the only one we have seen upon the subject—says a trade-mark is a name, symbol, figure, letter, form, or device, adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, and distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry, or enterprise: Upton on Trade-marks, ch. 1, p. 9.

Assuming these as the proper definition, what portion of them can one claim as his trade-mark, and can he have more than one, and must not that to which he lays claim be so clear and well defined, and the right asserted to it in the same shape and form always, under all circumstances, as to give him an exclusive right? And must it not be in some way attached to the article manufactured so that it shall be exhibited in its whole extent?

A trade-mark is not different in principle from the marks or brands owners of live-stock which run at large put upon each one of them. The object is the same, and that is, to distinguish the property bearing it from that of another.

In respect to cattle and hogs, it is well known there is great similarity between those of different owners, in color, make, flesh-marks, and general appearance. The mark or brand usually decides the question of ownership, should a dispute arise thereon. No one man can have more than one mark, or brand, and it is required to be recorded. If the owner could have more than one mark by which to distinguish his property, great confusion and uncertainty would be produced, to such an extent as to defeat the object in view. We have found no case where a proprietor has claimed more than one trade-mark, and all concur in saying that the mark must be so clear and well defined as to give notice to others, and must not be deviated from at the suggestions of

whim or caprice. That it must be attached to the article manufactured in such a way as to be reasonably durable and visible, is also conceded. It must have a practical existence, not resting in the thought of the owner, but stamped or impressed or attached in some way to the article itself. Our common observation of such articles sold in the shops, teaches this, and it is so reasonable as to claim the acquiescence of every one. Of what use is such a mark, unless it be visible, and thus operate as a notice to the public? We can perceive none.

That the published declaration of a manufacturer, that he has adopted a certain word as his trade-mark, can lay the foundation, or even aid in laying the foundation of right of property in the word, cannot be reconciled with recognised principles upon which such property can be acquired, or with the policy of the law in recognising and protecting the acquisition. It is the *actual use* of the trade-mark affixed to the merchandise of the manufacturer, and this alone, which can impart to it the elements of property. The mere declaration of a person, however long, and however extensively published, that he claims property in a word as his trade-mark, cannot even tend to make it his property: Upton on Trade-marks 179.

With these preliminary remarks, we will consider: what do the complainants claim in their bill as their trade-mark?

If we comprehend the allegations in the bill on this head, they claim the words "Moline, Ills.," stencilled on the side of the beam of their ploughs in a straight, horizontal line, as their trade-mark, and this under the names of the manufacturers, or of some one of them.

Complainants then aver that said ploughs, by their said name of "Moline Plough," have acquired a national reputation, and no plough was sold as the "Moline Plough" by others than complainants until defendants commenced their manufacture at the same place in 1866, and the complaint is that they stencil on the beam of their ploughs in a straight, horizontal line in plain capital letters, the words "Moline, Ills." underneath their own names as manufacturers, and sell them as the "Moline Plough."

Complainants refer to their circular, Exhibit A, to sustain their allegations.

That is headed "Circular." "Deere & Co.'s Moline Plough Factory" in German text, or old English, and in the body of it

the public are informed that Deere's Moline Ploughs have for many years enjoyed the reputation of being the best plough in the West, &c. This circular is dated Moline, Ills., Sept. 1859, and signed Deere & Co. There is no claim in this of any trade-mark.

In appellees' argument, their trade-mark, or what is claimed as such, is copied in *fac simile*, except as to the size of the letters, and that mark is "John Deere," in the segment of a circle, and the words "Moline, Ills.," in a straight, horizontal line underneath, with a dash between them. Their whole argument claims that these words so arranged, and in this combination, are the trade-mark, if any they have; not the words "Moline, Ills.;" not the words "Moline Plough;" but the words as arranged in the copy given by their counsel.

Appellees argue that their name and address upon their ploughs is a proper trade-mark, pure and simple; that it indicates by whom and where the article is manufactured, nothing more, nothing less, and nothing else, and so fulfils most completely all the conditions of the law.

This we consider an abandonment of any claim to the words "Moline, Ills.," or the words "Moline Plough," as their trade-mark, and the mark being a trade-mark by being placed on the beam, is a virtual disclaimer of all right to any other claimed in circulars and price-lists. The question is then narrowed down to this: Can one manufacturer of an article at a particular town, whose wares have gained celebrity, appropriate as his own, to the exclusion of every other person in the same place, the name of the place, and thus prevent him from designating his manufactures as of the place where they are actually made? We do not think the cases go to this extent. Though, as Upton says, the simplest case of a trade-mark fulfilling the condition of the law, and thereby entitling him who adopts it to protection in its exclusive use, is the name and address of the manufacturer: p. 102. In such a case, no question as to the right to exclusive use can arise. But it must be observed that such trade-mark has two constituents—the name of the manufacturer and the place of his operations or address; neither, singly, will suffice to be effectual for protection; both must be used.

Had appellants adopted this trade-mark or so simulated it as to deceive the public, and with that intent, an injunction might

be proper. How is the proof on this point? An exhibit is made of the marks of these parties, as branded or stencilled on the beams. The one is "John Deere," in large, heavy capitals in black paint, on the segment of a circle, with the words "Moline, Ill.," in a straight, horizontal line underneath, in smaller capitals, in like black paint, with a dash or *reversed flourish* between them. The name of appellants is in smaller capital letters, on a segment of a circle, at least two inches longer than that of "John Deere," and the address, "Moline, Ill.," in smaller capital letters, on a straight, horizontal line, and a dash between them.

There is, it is true, a resemblance between these marks, as there necessarily must be, the same lines being used, and the same color of paint; but the names of the respective manufacturers are so different, and the space occupied by appellants' names so much longer than that occupied by the name of appellees, as to attract the notice of the most casual observer, drawn to it, as it would be, by the heavier body and larger size of the letters of the name "John Deere," and the names themselves being so very different. No persons of ordinary observation could suppose, in looking at appellants' brand, that it was designed to palm off his manufacture as that of John Deere, when it told them, as plain as letters and words can speak, that it was not made by John Deere or by appellees. Upton, in discussing what is a violation of a trade-mark, says: "When A adopts or imitates and applies to articles of his manufacture the name or mark previously used by B as a designation for his productions, the wrong consists in the sale by A of his goods as and for the goods of B." The doctrine is clearly recognised, that no man can have a right to represent his goods as the goods of another, and in many of the cases coming under our notice, it was shown that the party complained of was selling his manufacture as the manufacture of another. Nothing of that kind is pretended in this case. In the circulars of appellants, they distinctly announce that they are not the ploughs made by appellees, but are "Moline Ploughs," and claim an examination and comparison with other "Moline Ploughs," and the testimony shows on no occasion, and to no person engaged in the trade, were their ploughs represented to be the workmanship of appellees. They claimed to such that they were "Moline Ploughs," but superior to the Deere plough, and there is no proof that they are inferior.

Were appellants violating any right of appellees in so representing them? It is in proof the ploughs manufactured at Moline by Kinsey were branded "Moline, Ills.," and those made by Beery in the same manner, and that various articles manufactured at that place are so branded. The words have acquired a generic meaning, and one manufacturer at Moline has the same right to use them that any other manufacturer there has.

A case illustrative of this idea is found in 19 Pick. 214, the case of *Thompson v. Winchester*, where it was held that if the defendant made and sold medicines, calling them "Thomsonian," as a generic term, designating their general character, but did not offer or sell them nor consign them to others to sell, as and for medicines made and prepared by the plaintiff, and if he made and compounded such medicines of bad materials, with inadequate skill, by means whereof the credit and character of all Thomsonian medicines were brought into disrepute, the plaintiff could recover no damages; no infringement of plaintiff's right was shown.

Appellees have no patent upon any portion of their ploughs; any one therefore has a perfect right to make ploughs, in their exact similitude, even to the curve of the mould-board, and "the tip of the handles," in the minutest, as well as in the most important, points; any one has a right to manufacture them, no matter where the maker may reside, and has the right to put the name of the place where manufactured, as well as his own name, on such part of the ploughs as he pleases, taking care, however, so to use the brand as not to deceive the public, so as not to create a belief that the plough is the manufacture of another.

In appellees' bill they claim the words "Moline, Ills.," and "Moline Plough," as words to which they have an exclusive right when used to designate ploughs, and so the Circuit Court must have understood it, for the very language of the finding is, that the complainants' bill is true, and that they are entitled to the exclusive use as a trade-mark, in the manufacture and sale of ploughs, of the words "Moline Plough;" also to the various letters, figures, numbers, and combinations as used and applied by them as set forth and contained in Exhibit A, attached to their bill, and used by them to designate the various sizes, shapes, and patterns of ploughs manufactured and sold by them.

The decree is still more comprehensive.

It is decreed that the defendants, and each of them, their

agents and servants, be for ever restrained and enjoined in any way from calling or advertising themselves as "The Moline Plough Company," or "Moline Plough Co.," or similar words, and from advertising, calling, selling, or placing upon the ploughs made or to be made by them, or any or either of them, the name of "The Moline Plough," or "Moline Plough," or "Moline Ploughs," or other words or names in imitation of the said trade-mark of said complainants, or any part thereof, or in any way or manner using the word "Moline," either upon their ploughs, or in advertising the same, as in any way designating, pointing out, or indicating the manufacture of defendants, or in any other way, except in connection with such word or words as shall, and shall only, point out and designate the place where the defendants manufacture ploughs.

The decree further enjoins appellants from using or placing upon their ploughs any of the letters, numbers, or figures or combinations, like those placed upon complainants' ploughs, and used by them to indicate the various sizes, shapes, and patterns of such ploughs; and they are further enjoined from branding, stencilling, or otherwise placing upon their ploughs the words "Candee, Swan & Co.," or other words in a circular form, in imitation of the complainants' brand, upon the beam of any such plough or ploughs, over the words Moline, Illinois, or any abbreviation of such words or either thereof.

We are not mistaken, therefore, when we say that the trade-mark claimed by this bill, and found by the court, is the words "Moline Plough," to which they are entitled to the exclusive use, and not the words "John Deere," on the segment of a circle, with "Moline, Ill." on a straight, horizontal line underneath. The finding and decree follows the bill, and shows the same case.

If this then be the trade-mark, it is of no value, as it has never been applied by appellees to any plough they have manufactured, or attached to it in any way, and if they had so done, there is not a particle of proof appellants have affixed it to any plough of their manufacture. The law is well settled, that a circular, price list, or advertisement, no matter how frequently repeated, cannot constitute a trade-mark, and it is only in that way appellees have used, and appellants also, using it as a generic term, which they had a clear right to do. Is it possible—can it be tolerated for a single moment, that a maker of ploughs at Moline

shall not be permitted to sell his work as a Moline plough, to advertise them in every form as the Moline plough? Would it not be the truth, and shall a manufacturer be prevented from publishing to the world where his wares are made?

In what could a contrary notion result, but in a monstrous monopoly? If, to the exactions committed upon the agricultural portion of our people, by the patentees of reapers and mowers, implements now indispensable, there shall be superadded a monopoly in the manufacture and sale of the plough at a point so important as Moline, how shall the farmers bear this grievous and oppressive burden?

Shall it be said that because appellants have branded their pumps, which it appears by the testimony they manufacture, "Moline, Ill.," no other manufacturer of pumps at that place shall so brand his?

Shall it be said that any man or association of men can so appropriate the name of a town where manufactures can be carried on in the most extensive manner, and on a gigantic scale, such will be her increased facilities, by the expenditure by the government of large sums of money to that end?

Monopolies are odious, against which the public sentiment has ever revolted; and what can be more odious and oppressive than the monopoly of the manufacture and sale of ploughs? If it can be claimed by the association at Moline, it can also be claimed for Peru, Peoria, Chicago, and the various other places at which these implements are largely made.

In a very recent English case, plaintiffs had been for many years manufacturers of starch at a small hamlet in Scotland, called Glenfield, where it was said a stream of water particularly suited for making that article, flowed. Under the name of "Glenfield Starch," their goods had acquired a good reputation.

In 1868 the defendants set up starch works at Glenfield, and sold starch in packets labelled "C. & Co., Starch Manufacturers, Glenfield." In color alone those labels resembled those of plaintiffs; but it was shown that the colors selected were common to almost all starch makers. *Held*, on bill filed for an injunction, that the defendants were entitled to manufacture starch at Glenfield, and doing so, to describe their goods as made there, and themselves of that place; that even if they had chosen that place for their works expressly because the name had become known in

the markets, and with the intention of introducing that name as part of the description of themselves and their goods, it was open to them to do so, and therefore, as the labels and inscriptions in no way imitated those of the plaintiffs', an injunction originally granted by MALINS, V. C., was, on appeal, dissolved: *Wother-spoon v. Carrie*, 23 Law Times Reports 443.

This case bears upon the case before us. What is to be understood by the closing paragraph is, that starch being put up for market in packages, is labelled in such a way as to constitute a trade-mark, and as the defendants' labels did not imitate those of plaintiffs, except in color, as stated before, there could be no piracy of the trade-mark that did not consist in the word "Glenfield." So in this case, if the trade-mark of appellees is as charged in the bill, and as found by the court, there has been no piracy, and the same reasons that induced competition in the manufacture of starch at Glenfield, that starch made there had a great reputation, and that defendants had a right to select that place on that account, because the name had become known in the market, so here, appellants were justified in commencing their operations at Moline, because the ploughs manufactured at that place had obtained a great reputation through the exertions of appellees, or of their head, Mr. Deere.

Any number of plough makers can go with impunity to Moline and establish there plough factories and brand on their ploughs their own names and the name of the town, and send them broadcast over the country, to the joy of our farmers and to the common benefit of all. But the court went in their decree to the full extent of the claim of appellees; and decided they had a property in the letters, figures, and numbers placed on their ploughs, with this modification; whereas, it is charged in the bill that the ploughs manufactured by complainants have been of various qualities, sizes, and patterns for different qualities and conditions of soil, and for different operations, and distinguished by different names, letters, and numbers; and further referring to Exhibit A. their ploughs are spoken of as of different qualities, sizes, and patterns, the various sizes, shapes, and patterns of ploughs. It is in proof by two of appellees' witnesses, G. W. Vinton, one of appellees, and C. G. Bryant, that they designated the different sizes, *qualities*, and patterns, by numbers, from one to nine inclusive, put on the top of the beam next to the standard, and as they

modified them from time to time, to suit the demand, they added numbers and fractions of numbers. He also says, "the same letters, figures, and numbers appear on defendants' ploughs, corresponding with those we use, and they appear in the same form, style and appearance, and designate the same style and *quality* of ploughs as our own." On cross-examination he says, these letters and numbers denote the size, quality, shape, and brand of the ploughs.

Charles G. Bryant says he is familiar with Deere's numbers and figures and combinations, as applied to their ploughs, and they designate the size, shape, and *quality*, of the various kinds of ploughs on their price list, to which they are applied, and on cross-examination he says, makers of ploughs, generally, mark them with letters and numbers, or combinations of letters and numbers, to denote the size, shape, and *quality* of ploughs made by them. That one cannot have a property in letters, figures, and words used for such purposes seems to be settled by the authorities.

It was held in the case of *Stokes v. Landgroff*, 17 Barb. 608, referring to *Amoskeag Manf. Co. v. Spear*, 2 Sandf. S. C. 599, in respect to words or devices which do not denote the goods or property or particular place of business of a person, but only the nature, kind, or quality of the article in which he deals, a different rule prevails, no property in such words, marks, or devices, can be acquired. There is, obviously, no good reason why one person should have any better right to use them than another. They may be used by many different persons at the same time in their brands, marks, or labels on their respective goods, with perfect truth and fairness.

They signify nothing, when fairly interpreted, by which any value in a similar article could be defrauded.

The case of the *Amoskeag Manf. Co. v. Spear* is said to be the leading American case on the question of trade-marks, and in that it was held, that although by the long-continued use of certain words, letters, marks, or symbols, which do not, of themselves, and were not designed to indicate the origin or ownership of the goods to which they are affixed, the goods so marked, and because so marked have become known as those of the manufacturer who first used them, such fact cannot alter the original meaning of the words or symbols, or the intent with which they were first used, as denoting the name of the thing or its general or relative quality,

or take from others the right to employ them in the same sense. This portion of the claim set up by appellees must fall to the ground, as well as the claim based upon the use of the word "Moline" used to designate appellants' ploughs.

It is very apparent from the whole tenor of appellees' bill, their claim is founded on the fact that their ploughs were sold by them as the "Moline Plough," and not by the name of the manufacturer, and as that is only a generic term, it is seen they can claim no exclusive right to the use of that name by which to designate their manufacture. *Thompson v. Winchester, supra*, and to which citation should be added *Singleton v. Bolton*, 3 Doug. 293; *Canham v. Jones*, 2 Ves. & Bea. 218, and *Perry v. Truefitt*, 6 Beav. 66.

These cases are all decided on the principle that the name used in the respective cases had become generic—merely descriptive of the kind or quality of the article to which they were respectively applied, without reference to any particular manufacturer.

Suppose the law required such person claiming a trade-mark, to record the same, how would that of appellees appear on the record? If by these letters and figures or a combination of them, the law is settled they are no basis for the claim of the words "Moline Ploughs," the law is equally well settled that no exclusive right can be had in them; if in the form presented by the counsel for appellees in their brief, "John Deere" inscribed on the segment of a circle, and the words "Moline, Ills.," in a straight, horizontal line underneath, it is not so claimed in the bill, and if it was, there is no proof that such trade-mark has been violated by appellants.

But it seems to us, it is not quite clear what appellees intend is, and shall be their trade-mark. It is not made out to our satisfaction, and we believe the rule to be in such cases, the proof must be clear, leaving the question beyond a reasonable doubt.

It is not possible for us, even if it were necessary, as it is not, to review the many cases cited on the argument. There is not entire harmony in them; but one of the most important principles deducible from them is, that when a trade-mark is violated, the essence of the wrong done consists in the sale of the goods of the manufacturer, as and for the goods of another, and therefore, that such violation can only be predicated on a copy or imitation of a trade-mark, or those portions of a trade-mark which truly designate the origin or ownership of the goods; and another is, that

a similarity between two trade-marks used by different manufacturers for their goods, although of such a character as to induce a belief in the mind of the public that they belong to and designate the goods of the same manufacture or trade, is not of itself sufficient ground for a prohibition of the use of such trade-mark by him who did not first adopt it. That similarity, to entitle the originator to the protection of the law, must be such as to amount to a false representation—not alone that the two articles have the same origin, but that the goods to which the simulated mark is attached are the manufacture of him who first appropriated the trade-mark: *Amoskeag Manf. Co. v. Spear, supra*; Upton on Trade-Marks 136.

Testing this case by these principles it has no foundation. On the part of appellants, the essence of the wrong alleged to be done is absent; and though a similarity may exist in this mark or brand of appellants with that of appellees, if the words "John Deere," printed in capital letters on the segment of a circle, with the name "Moline, Ill.," on a straight, horizontal line, also in capital letters, be their trade-mark, which is not so alleged in the bill, or proved or found by the court, it is not such as to amount to a false representation that the goods of appellant, bearing his brand, had the same origin and were of the manufacture of appellees—if they did, in fact, first appropriate it as a trade-mark.

On this point there is no evidence whatever. There was no pretension by appellees of a trade-mark until appellants commenced to manufacture, and that successfully, ploughs at Moline, and which they published far and wide as the Moline Plough, and thus interfered with the monopoly appellees had created. For their audacity in so interfering, the sternest decrees of the law are invoked, but in this court the invocation will be vain on such facts as are presented by this record.

We forbear any discussion of the questions presented by the supplemental bill, deeming it unnecessary, satisfied as we are that appellees have no standing in a court of equity; and for the same reason decline the discussion of the question how far complainants under Deere may be protected in any trade-mark he may have had and used.

Entertaining the views herein expressed, the decree of the Circuit Court must be reversed, the injunction dissolved, and the bill dismissed.

A mere mark or symbol which can be used by one with as much propriety as the other, cannot become a trade-mark. So held when an injunction was denied as to the letters A. C. A., these letters being used by both parties on tickings manufactured by them, to denote their quality: *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. 599. Injunction denied as to the words "Galen," "Lake," "Cylinder," "Wayne," and "New York," they being used to denote the quality of the glass made by both parties: *Stokes v. Sandgraff*, 17 Barb. 608. Injunction denied as to the words "Burgess's Essence of Anchovy:" *Burgess v. Burgess*, 3 De G. M. & G. 896.

The mark must denote the origin or ownership of the goods and not the kind or quality: Upton, pages 26, 98 and 99. *Collins v. Cowen*, 3 Kay & Johnson 428.

When words or names are in common use, the law does not allow them to be appropriated so as to become the subject of property: *Newman v. Alvord*, 49 Barb. 591; *Burnett v. Phalon*, 9 Bosw. 192; *Wolfe v. Goulard*, 18 How. Pr. 64; *Corwin v. Daly*, 7 Bosw. 222; *Binninger v. Wattles*, 28 How. Pr. 206.

A party cannot appropriate as a trade-mark a sign or symbol, which, from the nature of the fact it is intended to represent, others may employ with equal truth, and therefore have an equal right to employ for the same purpose: *Farina v. Silverlock*, 6 De G. M. & G. 214; *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. 607; *Perry v. Truefitt*, 6 Beavan 66; *Fitridge v. Wells*, 13 How. Pr. 385; *Partridge v. Menck*, 2 Barb. Ch. 101; *Pidding v. How*, 8 Simons 477; *Town v. Stetson*, 5 Abb. Pr. N. S. 218.

John S. Faber and John H. Faber, both manufactured lead pencils near Nuremberg, Germany. They both marked their names on pencils made by them. On the trial of the case it was proved

that all the manufacturers of lead pencils near Nuremberg, of which there were about twenty, put up their pencils in the same way. The court held that both parties had a right to mark their names on pencils made by them; and that there was nothing peculiar in the way in which plaintiffs marked their pencils. The injunction was therefore denied: *Faber v. Faber*, 49 Barb. 357.

Two firms of the same name, carrying on the same kind of business in two different places; the one cannot acquire a trade-mark in its name as against the other: *Rogers et al. v. Saintor*, 97 Mass. 291.

Advertisements alone cannot make a trade-mark. The mark, sign, or symbol must be affixed to the article: Bouvier's Law Dictionary, title Trade-Mark; Upton 99, 179.

If the name has become generic and denotes the name of an article, and not an article made by a particular person, there can be no property in it: *Singleton v. Botton*, 3 Doug. 393; *Canham v. Jones*, 2 Vesey & Beames 218; Upton on Trade-Marks 24, 25, 110, 116 to 122 inclusive. *Thomson v. Winchester*, 19 Pick. 214; Daniel's Chancery Practice 1754; Eden on Injunctions 226. In *Newman v. Alvord*, 49 Barb. 588, the court held there could be property in the word "Akron," that being the name of a village, but they expressly say that if the defendant had been doing business in Akron the case would have been different.

In words which have a common acceptance, and can be used by one with as much propriety as the other, there can be no property so held as to the words *Schiedam Schnapps* and *Dessicated Cod Fish*: *Wolfe v. Goulard*, 18 How. Pr. 64; *Town v. Stetson*, 5 Abb. Pr. N. S. 218.

The party coming into a court of equity to have his trade-mark protected must come with clean hands: *Fitridge*

v. Wells, 13 How. Pr. 385; *Fittridge v. Wells*, 4 Abb. Pr. 144; *Partridge v. Menck*, 2 Sandf. Ch. 622; *Craft v. Day*, 7 Beavan 84; *Crawshaw v. Thompson*, 4 Man. & Gr. 357; *Welch v. Knot*, 4 Kay & Johns. 747.

When the parties have the right to make the article, fraud must be shown on the part of the defendants or the injunction will be denied: *Burgess v. Burgess*, 17 Eng. Law and Eq. 260; *Farina v. Silverlock*, 39 Eng. Law and Eq. 514; *Daniel's Chancery Practice* 1754 and note 3.

The party claiming property in the trade-mark said to be violated must be the first to use it for that purpose: *Upton on Trade-Marks* 47.

The defendants will not be decreed to pay costs if they have not been guilty of fraud: *Millington v. Fox*, 3 Mylne & Craig 338; *Crawshaw v. Thompson*, 4 Man. & Gr. 357; *Partridge v. Menck*, 1 Howard's Appeal Cases 547; *Upton on Trade-Marks* 34 to 46 inclusive; *Willard's Eq. Jur.* 403, note 5; *Palmer v. Harris*, 8 American Law Reg. N. S. 137, and authorities cited by SHARSWOOD in delivering the opinion of the court: *Partridge v. Menck*, 2 Sandf. Ch. 622. *He that hath committed iniquity shall not have equity*, Francis' Maxims 5.

Advertising cannot make a trade-

mark: *Upton* 179; *Bouvier's Law Dictionary*, title *Trade-Marks*.

The injunction will be denied if granting it will create a monopoly: *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. 606 and 607.

If the deception will not deceive the ordinary mass of purchasers the injunction will be denied: *Merrimac Manufacturing Co. v. Garner*, 4 E. D. Smith 387; *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. 607.

On the dissolution of a firm, all the former partners are entitled to use the trade-mark of the firm: *Coffin v. Brunton*, 5 McLean 256.

The protection of the court will not be given if the party seeking it is not entitled to the exclusive use of the trade-mark said to be violated: *Upton* 22 and 30 near the bottom.

All the parties in interest must be made parties to the suit: *McCall v. Sisher*, 2 Gil. 47; *Greenleaf v. Queen et al.*, 1 Pet. 138; *Van Epps v. Van Deusen*, 4 Paige 75; *Burnhams v. Burnhams*, 2 Barb. Ch. 407; *Shaver v. Brainard*, 29 Barb. 25.

Further as to trade-marks see *Filley v. Fassett*, 8 Am. Law Reg. N. S. 402, note and cases cited; *Hostetter v. Vowinkle*, 1 Dillon Cir. Ct. Rep. (in press).

C. W.

Supreme Court of Errors of Connecticut.

THOMAS S. SELLEW'S APPEAL FROM PROBATE.

A probate decree settling an executor's account is not conclusive evidence of his liability in money for the balance with which he is charged. That sum represents a balance of the estate undisposed of remaining for distribution, and the decree while it stands is conclusive evidence that he had in his hands those items of personal property.

But where a mistake has been made in the settlement of the account, and property with which the executor is charged proves in fact to have been lost or